88-1868

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,

v.

WILLIAM VAN NOTE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Do the Occupational Safety and Health Act of 1970 and the workplace container labeling provisions of OSHA's Hazard Communication Standard expressly preempt the provisions of the New Jersey "Worker and Community Right to Know Act" that require employers to label containers in the workplace?

PARTIES TO THE PROCEEDING

The following is a complete list of all parties in the proceedings below:

a. Plaintiffs:

Fragrance Materials Association of the United States, Inc.;
Flavor & Extract Manufacturers' Association of the United States, Inc.;
Bush Boake Allen, Inc.;
Dragoco, Inc.;
Firmenich, Inc.;
International Flavors & Fragrances, Inc.;
Isogenics, Inc.;
H. Kohnstamm & Co., Inc.;
Mane USA, Inc. (formerly V. Mane Fills, Inc.);
Noville Essential Oil Company, Inc.;
Polarome Manufacturing Corp.;
Roure, Inc. (formerly Roure Bertrand Dupont, Inc.);
Takasago International Corp. (USA);
Ungerer & Co.;
Universal Fragrance Corporation.

Union Camp Corporation is the parent corporation of petitioner Bush Boake Allen, Inc.; Universal Foods Corporation is the parent corporation of petitioners H. Kohnstamm & Co., Inc. and Universal Fragrance Corporation; F. Hoffman LaRoche & Co. is the parent corporation of Roure, Inc.; and Takasago (Japan) is the parent corporation of Takasago International Corporation (USA).

b. Defendants:

William Van Note;
J. Richard Goldstein;
Robert E. Hughey.

c. Intervenor-Defendants:

Joseph H. Rodriguez;
New Jersey State Industrial Union Council, AFL-CIO;
Citizen Action of New Jersey;
Philadelphia Area Project on Occupation Safety & Health;
New Jersey Environmental Lobby;
New Jersey State Firemen's Mutual Benevolent Association;
International Association of Firefighters, New Jersey AFL-CIO;
Communication Workers of America, AFL-CIO;
District Three, International Union of Electronic, Electrical, Technical, Salaried and Machine Workers, AFL-CIO;
International Ladies' Garment Workers' Union, AFL-CIO;
Amalgamated Clothing and Textile Workers Union, AFL-CIO, Central and South Jersey Joint Board;
United Paperworkers International Union, AFL-CIO;
Oil, Chemical and Atomic Workers Union, AFL-CIO, Locals 8-149, 8-760, and 8-5570;
United Auto Workers Union, AFL-CIO, Local 502;
Chemical Workers Association, Inc.;
Independent Oil Workers Union;
Trenton Education Association;
Aluminum, Brick & Glass Workers International Union, AFL-CIO, Local 514-G;
Pennsylvania Federation Brotherhood of Maintenance of Way Employees, AFL-CIO;
Coalition Against Toxics;
League of Conservation Voters (New Jersey);
Clean Water Action (Washington, D.C. and New Jersey);
Student Public Interest Research Group of New Jersey;

Environmental Action (Washington, D.C.);
League of Women Voters of New Jersey;
Sierra Club (New Jersey);
American Lung Association of New Jersey;
New Jersey Tenants Organization;
New Jersey Association of County Health Officers;
New Jersey Health Officers Association.

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WILLIAM VAN NOTE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered in this case on 28 February 1989.

OPINIONS BELOW

The opinions of the court of appeals are reported as *New Jersey Chamber of Commerce v. Hughey*, 868 F.2d 621 (3d Cir. 1989) (*"Hughey II"*), and *New Jersey Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*"Hughey I"*).[1] They are reprinted beginning at pages 1 and 85 of the separately printed Appendix filed

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[1] Certiorari exposes the entire case to review, including the decision of the court in *Hughey I*. *See, e.g., Christianson v. Colt Industries Operating Corp.*, 108 S.Ct. 2166, 2178 (1988); *Rogers v. Hill*, 289 U.S. 582, 586-88 (1933); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916).

in No. 88-1845 by the New Jersey Chamber of Commerce petitioners.[2] The district court's original opinion is reported as *New Jersey Chamber of Commerce v. Hughey*, 600 F. Supp. 606 (D.N.J. 1985) (25a). The district court's opinions on remand from *Hughey I* (112a, 121a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on 28 February 1989 (1a). A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on 7 April 1989 (155a). By orders of 1 and 9 May 1989, the court of appeals stayed the issuance of its mandate (158a).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The district court's jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331 and 1337(a).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Supremacy Clause of the Constitution of the United States, Article 6, clause 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 18 of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 667, the Hazard Communication Standard promulgated by the Occupational Safety and Health Administration in November 1983, 29 C.F.R.

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[2] Petitioners herein adopt that Appendix and hereafter will provide parallel citations to it in parentheses, *e.g.*, "(1a)".

§ 1910.1200, and the New Jersey Worker and Community Right to Know Act, N.J.S.A. 34:5A-1 *et seq.*, are reproduced beginning at pages 168, 466, and 173 of the Appendix.

STATEMENT OF THE CASE

Petitioners are trade associations of flavor and fragrance manufacturers, and certain individual members thereof, who brought suit in the United States District Court in New Jersey to enjoin enforcement of the New Jersey Worker and Community Right to Know Act by the respondent state officials. The action was consolidated with one instituted by the New Jersey Chamber of Commerce and others. Petitioners charged that certain provisions of the New Jersey Act are preempted by the Occupational Safety and Health Act and the federal Hazard Communication Standard.

1. The Occupational Safety and Health Act

The Occupational Safety and Health Act (hereafter "OSH Act") directs the Occupational Safety and Health Administration (hereafter "OSHA") to promulgate mandatory national occupational safety and health standards applicable to businesses affecting interstate commerce. *See* 29 U.S.C. §§ 651(b)(3), 655. Until OSHA has promulgated a standard, the states are not preempted from regulating. *Id.* § 667(a) (168a). Once such a standard has been promulgated, however, the states are precluded from enacting standards "relating to" the matters covered by the federal standard without first obtaining OSHA's specific consent:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a federal standard has been promulgated under Section 655 of this title shall submit

> a state plan for the development of such standards and their enforcement.

Id. § 667(b) (169a).

Recognizing that state laws that "relate to" matters covered by a federal standard could impair the effectiveness of the standard, Congress further provided that states could regulate under the authority of a "state plan" only if OSHA is satisfied that the state requirements will be "at least as effective" as the OSHA standard, will "not unduly burden interstate commerce," and are "required by compelling local conditions." *Id.* § 667(c)(2) (169a). OSHA may reject a proposed plan only after notice and opportunity for a hearing, and its decision is subject to review in the courts of appeals. *Id.* § 667(d) and (g) (170a, 172a).

2. The Hazard Communication Standard

In November 1983, OSHA promulgated its "Hazard Communication" Standard, 29 C.F.R. § 1910.1200; 48 Fed. Reg. 53280.[3] The standard originally applied only to employers in the manufacturing sector such as petitioners, but was extended to all employers in 1987. *See* 52 Fed. Reg. 31852 (503a).

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[3] Hereafter, the standard will be cited only to the appropriate subsection. The original standard is reproduced in full in the Appendix beginning at page 466, and the preamble beginning at page 217. The validity of the standard was upheld, with modifications, in *United Steelworkers of America v. Auchter*, 764 F.2d 728 (3d Cir. 1985). Subsequently, in *United Steelworkers of America v. Pendergrass*, 819 F.2d 1263 (3d Cir. 1987), the court directed OSHA to extend the standard to employers beyond the manufacturing sector. For further litigation regarding the scope of the standard, *see United Steelworkers of America v. Pendergrass*, 855 F.2d 108 (3d Cir. 1988), *Associated Builders and Contractors, Inc. v. Brock*, 862 F.2d 63 (3d Cir. 1988). Certiorari petitions were filed by various parties in the last two cited cases. *See* Nos. 88-1070, 88-1075, 88-1385, 88-1434. On May 15, the Court granted the government's petition in No. 88-1434, and denied the petitions in Nos. 88-1070 and 88-1385.

The standard is perhaps OSHA's most ambitious undertaking. Rather than dealing with the hazards of a single chemical or specific group of chemicals, as OSHA standards normally do, it deals comprehensively with all chemicals in the workplace. OSHA considered the matter for more than 6 years, and conducted an extensive two-year rulemaking with hearings throughout the country.

One of the principal motivating forces behind the hazard communication standard was OSHA's concern about the "proliferation" of state and local labeling and right to know laws and the consequent "potential for contradictory and cumulatively burdensome requirements . . . ." 47 Fed. Reg. 12092, 12108 (March 1982). When OSHA proposed the standard in March 1982, only nine states and one locality had such laws, but OSHA expressed its concern that others—including New Jersey—were considering them. *Id.* at 12095. A comprehensive federal standard, said OSHA, "would eliminate this conflict, decrease the cumulative burden of compliance, and ensure basic protection for all employees." *Id.*

These concerns remained paramount in November 1983 when OSHA promulgated the final standard. It noted that the number of states and localities with such laws had increased since the standard had been proposed, as had the number considering such legislation, and that such laws "cover different lists of substances, have different reporting requirements, serve different purposes, have different labeling and material safety data sheet requirements, and have different educational and training requirements." 48 Fed. Reg. at 53284 (235-236a). OSHA stated forcefully its intention to preempt such laws and reduce their regulatory burden, *id.* at 53284 (236-237a), 53322 (399a), 53329 (426-427a), and 53334 (444-445a), and emphasized its determination "to scrutinize carefully any state law or regulation submitted" as part of a state plan in order to insure "that any ad-

ditional requirements contemplated by the state do not conflict with or adversely affect the effectiveness of OSHA's standard," *id.* at 53322-323 (399-400a). *See also id.* at 53334 (445a).

Accordingly, the standard starts out:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of § 18 of the Occupational Safety and Health Act (29 U.S.C. 651 *et seq.*) which deals with state jurisdiction and state plans.

Subsection (a)(2) (467a).

The standard proceeds to designate lists comprising more than 2300 chemicals that employers must treat as "hazardous." Subsection (d) (476-478a). *See also* 48 Fed. Reg. at 53299 (298a). Employers also must evaluate, by means of tests, literature searches, and review of other available data, *all* other chemicals present at their facilities to determine whether they present any physical or health hazards. *Id.*

Information regarding these hazardous chemicals and their specific hazards must be communicated to employees by an integrated program of container labeling, Material Safety Data Sheets (MSDSs), and employee training pursuant to subsections (f), (g), and (h) of the standard (479-486a). Because OSHA decided that the container label should serve as an "alert mechanism," 48 Fed. Reg. at 53327 (416a), "an immediate warning of hazards in the workplace," *id.* at 53301 (306a), and not as the repository of technical information, the standard mandates simply that labels contain warnings of the specific hazards posed by a substance (*e.g.*, "hazardous

to lungs if inhaled"), and the "identity" of the contents. *See* Subsection (f)(4) (480a). And because the only purpose of the "identity" on the label is to refer one to the correct MSDS, OSHA decided that the "identity" may be any designation that the individual employer wishes to use, including common names or code numbers familiar to its employees, so long as the same identity is used on the corresponding MSDS for the substance or mixture. *See* 48 Fed. Reg. at 53301 (306a), 53303 (317a).

The MSDS is the "primary vehicle for transmitting detailed hazard information." *Id.* at 53305 (327a). In addition to the identifier which corresponds to that used on the label and thereby "links" the two for the employees, the MSDS must include the proper chemical name of the substance, its physical and chemical characteristics, and both its physical and health hazards. Subsection (g)(2)(i)-(iv) (481-482a). The MSDS also must state the signs and symptoms of exposure, primary routes of entry, permissible exposure limit, precautions for safe handling and use, protective equipment, and emergency and first-aid procedures, and must be readily available to employees. Subsection (g)(2)(iv)-(x) and (8) (482-484a).

Finally, the standard mandates an employee training program that must include instruction in the detection of hazardous chemicals, the specific hazards of the chemicals with which the employees work, protective measures, and an explanation of the labeling system and the MSDS. Subsection (h) (485-486a). Training in the manufacturing sector was completed by May 1986 when compliance with all provisions of the standard was mandated. Subsection (j) (491a). Thus, all manufacturing sector employees have been working under the OSHA system for the past 3 years.

The standard also requires employers to label "downstream" shipments, *i.e.*, shipments *from* the plant, and to

include with such shipments the corresponding MSDSs. Subsections (f)(1) and (g)(6) (479-480a, 484a). The labeling requirements are the same as the in-plant requirements with the addition of the name and address of the manufacturer. The downstream provisions of the federal standard are not involved in the instant case because the New Jersey Act does not require downstream labeling.

3. The New Jersey Worker and Community Right to Know Act

Almost simultaneously with the OSHA standard, New Jersey enacted its "Worker and Community Right to Know Act." N.J.S.A. § 34:5A-1, *et seq.* (173a). The Act applies only to workplace operations and deals, as the district court found in its original opinion, "with precisely the same subjects in the workplace as are regulated by the OSHA Standard." 600 F. Supp. at 618 (52a).

The Act directs the State Department of Health to compile a list of all "workplace hazardous substances" that constitute "a threat to the health or safety of an employee," including any substance on an "environmental hazardous substance list" to be compiled by the Department of Environmental Protection. *See* § 5(a) (183a). There are approximately 2150 chemicals on the "workplace" list, 161 of which are taken from the "environmental" list.

The workplace container labeling requirements are the central feature of the Act and the only provisions directly at issue here. They appear in § 14 of the New Jersey Act (191-193a) and apply, as does the federal standard, to all containers in the workplace. There are two phases to the labeling. First, subsection (a) of § 14 requires that "every container . . . [of] a hazardous substance shall bear a label indicating the chemical name and [CAS]

number [4] of the habardous substance. . . ." "Hazardous substance" is defined in § 3(m) as any substance on the "workplace" hazardous substance list (178a). This labeling originally was required to be completed within 6 months of the effective date of the Act.

Subsection (b) provides that 24 months after the effective date of the Act, "every" container in the workplace must bear "a label indicating the chemical name and [CAS] number of the substance in the container," and, if there is a mixture in the container, the chemical names and CAS numbers "of the five most predominant substances in the mixture. . . ." This second-stage labeling has been referred to at times as "universal" labeling because it covers substances that the State has not determined to be hazardous.

A flavor or fragrance plant typically has between 50,000 and 70,000 containers, not including samples, that range in size from 4 ounces to 55 gallons (133a). Common or trade names, not chemical names or CAS numbers, are routinely used by fragrance and flavor companies in the plants and on their OSHA labels (*id.*). The difference may be illustrated by an example cited by the lower court. A substance now labeled by plaintiffs under the OSHA standard merely as "Galaxoide" would have to be labeled under the New Jersey system as: "1, 3, 4, 6, 7, 9—hexahydro—4, 6, 6, 7, 8, 8—hexamethyl cyclopenta gamma 2 benzopyrene," together with the CAS number (*id.*).

Section 7 of the New Jersey Act (185a) requires employers to complete a "workplace survey" on which they must report any "hazardous" substances present at their facilities, § 5(c) (184a), and an "environmental survey" on which they must report information about "environ-

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[4] "CAS" is an acronym for "Chemical Abstracts Survey," a scientific reference manual that assigns numbers to chemical substances.

mental" hazardous substances at their facilities, § 4 (182a). After receiving a completed "workplace" survey, the Department of Health must transmit to the employer a "hazardous substance fact sheet for each hazardous substance present in the employer's workplace." § 8(a) (186a). The fact sheets, which are prepared by the Department for each substance on the state's workplace list, § 5(d) (184a), are the functional equivalents of MSDSs and must be made available to employees, § 12 (189a). In another parallel to the OSHA standard, § 13 of the Act (189a) requires a comprehensive education and training program for employees.

New Jersey has not obtained OSHA approval of any of the state's workplace requirements as part of a state plan.

4. Proceedings Below

The district court held that the New Jersey Act was preempted in its entirety in the manufacturing sector because its essential provisions "related to" the matters covered by the federal standard. 600 F. Supp. 621-22 (57-60a). The court noted, *inter alia*, that the major provisions of the New Jersey Act deal with "hazard communication in the workplace, the identification of hazardous substances, labeling, and workplace training and educational programs, the precise issues covered by the Standard. . . ." *Id.* at 618 (51a).

On appeal, the court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Without discussing either the statutory "relating to" language, the state plan procedure, or OSHA's statements regarding the preemption of state right to know laws, the court stated that the "preemptive effect of the OSHA Act and the Hazard Communication Standard is narrow," 774 F.2d at 598 (106a), and used a "purpose" test to determine whether the New Jersey provisions were pre-

empted. The "purpose" in question, however, was not that of Congress, but rather that of the state. A provision of the New Jersey Act would be preempted, held the court, only if the "primary purpose" of the provision were the protection of workers. *Id.* at 595 (100a).

Applying this purpose test, the court held that the provision that employers complete "workplace" surveys was expressly preempted, together with the requirement that employers furnish to employees copies of the "fact sheets" compiled by the Department of Health for substances on the "workplace hazardous substance list." *Id.* at 594-95 (99-100a).[5]

Because the *Hughey I* court never specifically discussed the express preemption of "universal" labeling,[6] the precise scope of its holding with respect to express preemption of New Jersey's workplace labeling requirements was not definitively resolved until *Hughey II*. Read together, the decisions hold that:

1. The labeling requirements of subsection (a) of § 14 are not preempted as applied to the 161 substances on the state's "workplace hazardous substance list" that are also on the state's "environmental hazardous substance list,"[7] but are preempted as applied to the remaining

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[5] The court did not address the employee training requirements of § 13 of the Act, presumably because the state had conceded that they were preempted. The court also held that employers could be required to complete the state's "environmental" surveys. *Id.*

[6] One of the issues in *Hughey II* was whether the decision in *Hughey I* had ruled upon the express preemption of "universal" labeling. Despite considerable misgivings about the point, the court held that the panel had resolved the issue on the first appeal. *See Hughey II*, 868 F.2d at 626-27 (13-16a).

[7] The court in *Hughey I* referred to "environmental hazard labeling" as though it were a separate category of labeling under the New Jersey Act. *See* 774 F.2d at 596, 598 (101-102a, 107a). In fact, the Act contains no provision dealing with "environmental hazard labeling." As noted above, substances on the

substances on the "workplace" list because the "primary purpose" of the labeling is communication to "workers." *See* 774 F.2d at 595-96 (101-102a).

2. The "universal" labeling mandated by subsection (b) of section 14 is not preempted because its primary purpose is to communicate information to firemen, policemen, and the public at large. *See* 868 F.2d at 627 (15-16a).[8]

3. Moreover, even though labeling substances on the "workplace" list is preempted, such substances must be labeled under subsection (b) because the "primary purpose" of that subsection is communication to firefighters, emergency personnel, and members of the public. *See* 868 F.2d at 627-28 (16-17a). In other words, labeling of the identical substances is preempted under subsection (a) because it deals with substances on the "workplace" list, but not under subsection (b) when called by another name.

The *Hughey II* panel adhered to the "purpose" test adopted in *Hughey I*, and held that the prior panel's resolution of the express preemption issues was binding. 868 F.2d at 625-28 (11-18a). The panel also affirmed the district court's determination, on remand, that the New Jersey labeling provisions were not "impliedly" preempted. *See* 868 F.2d at 628-31 (18-23a). Rehearing in banc was denied (155a), but imposition of the state's labeling requirements was stayed by the court pending application for a writ of certiorari (158a).

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state's "environmental" list must be labeled only because § 5(a) of the Act specifically directs that they be included as a subset on the list of "workplace" hazards. In other words, the legislature determined that any substance that could be hazardous to the environment would, when concentrated in a workplace container, be hazardous to the employees working with it.

[8] *See* note 6 *supra*.

By making the "relating to" test mandated by Congress turn upon a state's "purpose," the court of appeals virtually eliminated the preemptive effect of the hazard standard and sustained intact the New Jersey workplace labeling requirements. Under the court's ruling, it will no longer be sufficient to label containers in accordance with the federal standard. Employers will have to add to the OSHA labels information that OSHA expressly decided should *not* be required—the proper chemical names and CAS numbers of the contents, including (pursuant to New Jersey's "universal" labeling provision) the chemical names and CAS numbers of even non-hazardous substances. The simplicity and cohesiveness of the OSHA system will go by the boards merely because the state claims that its labeling of workplace containers is directed not at workers, but at an audience that is not even present in the workplace.

REASONS FOR GRANTING THE WRIT

The matter of immediate concern here is the preemptive effect of the OSH Act and the Hazard Communication Standard upon New Jersey's workplace labeling requirements. The case has far broader implications, however, for the integrity and continued vitality of uniform regulation of workplace hazard communication. By making preemption turn upon how the state or local government elects to characterize the "purpose" of its law rather than the intent of Congress and the substantive content of the law in question, the Third Circuit has given the states a virtual primer on how to circumvent the preemptive effect of this and other OSHA standards. Under the court's purpose approach, state hazard communication laws would be upheld routinely and employers would be subjected to numerous and diverse state requirements, each having the potential for interfering with the effectiveness of the federal program and increasing the regulatory burdens upon domestic industries.

The Third Circuit also has effectively ousted OSHA from its statutorily prescribed role of passing upon state and local legislation that may impinge upon the federal program. Under the OSH Act, Congress directed that OSHA would decide whether state programs should be allowed once a federal standard has been promulgated. Under the court's decision, however, a state need not be concerned about OSHA scrutiny. All the state need do is ascribe to its program some purpose other than "worker" protection and the threat of preemption disappears. In much the same vein, OSHA's pronouncements regarding the preemption of state and local laws have been swept aside without discussion, much less deference.

This Court has been sensitive to the need for Congress to specify the preemptive effects of its statutes in order to avoid the ambiguity that otherwise attaches and the need for a difficult search for an elusive Congressional intent to "occupy the field" or the existence of a "conflict." Here, Congress has done so, but its intentions have now been subordinated to those of state legislatures across the country.

I. The Third Circuit's "Purpose" Test Conflicts with Prior Decisions of this Court and Would Permit the States to Nullify the Preemptive Effect of the Hazard Communication Standard

The touchstone to preemption analysis is, of course, the intent of Congress. *See, e.g., Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985). Here, Congress has specified the preemptive effect of a standard issued pursuant to the OSH Act. Once a standard has been promulgated:

> Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a federal standard has been promul-

> gated under Section 655 of this title shall submit a state plan for the development of such standards and their enforcement.

29 U.S.C. § 667(b) (169a). As this Court has emphasized in another context, "[t]he breadth of [the statute's] preemptive reach is apparent from" the "relating to" language. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983) (ERISA). The courts "must give effect to this plain language unless there is good reason to believe that Congress intended the language to have some more restrictive meaning. . . ." *Id.* at 97.

No such reason exists here. To the contrary, the broad preemptive scope of the language is confirmed by the entirety of the preemption provision. Recognizing that the issuance of federal standards would frequently displace state police power to a significant degree,[9] Congress provided a safety valve whereby states can continue to regulate through the instrumentality of a "state plan" if OSHA itself is first satisfied that the effectiveness of its standard will not be undermined by the state system. 29 U.S.C. § 667(c)(2) (169a). Had Congress intended OSHA standards to have only the narrow preemptive reach found by the Third Circuit, there would have been no need for such a carefully crafted procedure for agency review of state regulations.

Under the statutory scheme established by Congress, the states can seek to achieve legitimate state purposes in ways that do not "relate to" the matters addressed in federal standards, or they can follow the state plan route and submit their programs for evaluation by OSHA, the body selected by Congress and best equipped to evaluate the impact of state regulation upon the federal standard.

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[9] Congress rejected a more narrow preemption proposal that would have allowed States to impose standards more stringent than those adopted by OSHA. *See* H.R. Rep. No. 91-1765, 91st Cong., 2d Sess. 42 (1970).

Now, by virtue of the gloss put upon the statute by the Third Circuit, the states need do neither.

The "relation" of the New Jersey labeling to the OSHA standard was never really challenged by the state. As the Court noted in *Hughey II*, "[d]efendants concede the obvious areas of overlap between the state and federal requirements. . . ." 868 F.2d at 626 (13a). The relation is, in any event, obvious. Both the OSHA and New Jersey standards address precisely the same thing—labeling of containers in the workplace—and do so for the same reason—to communicate information about potential hazards. Indeed, as we show below, OSHA specifically considered imposing the essential ingredients of the New Jersey system (*i.e.*, chemical name and universal labeling) as part of the federal standard, but decided that the system would be more effective without them.[10]

The Third Circuit, however, read the statutory language to require a "primary purpose" analysis. By focusing upon the purpose of the state rather than that of Congress, the court issued an open invitation to semantic evasion of the preemptive effect of OSHA standards. By simply manipulating the ostensible "purpose" of their legislation, the "States could do indirectly what they could not do directly. . . ." *International Paper Co. v. Ouellette*, 479 U.S. 481, 495 (1987). As the district judge so aptly concluded when the case was first before him, the purpose test "would permit ready nullification of the Section 18 preemption provision." 600 F. Supp. at 622 (59a).

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[10] The "implied preemption" evidentiary hearing that was held on remand after *Hughey I* also demonstrated a relation as a matter of fact. Thus, the witnesses for both sides agreed, and the district court found (144-145a), that the New Jersey labeling would so impact the OSHA standard as to necessitate special label design and positioning programs and the revamping of the OSHA employee training program to minimize interference with the effectiveness of the federal standard.

The same kind of "purpose" analysis was emphatically rejected in *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981), a case that also involved a New Jersey law and a comparable preemption provision in ERISA (29 U.S.C. § 1144 (a)) applicable to state laws that "relate to" employee benefit plans. In ERISA, Congress specified the object of the "relating to" language (i.e., employee benefit plans), while in the OSH Act Congress left identification of the object to OSHA—*i.e.*, any issue addressed in an OSHA standard. The preemption test itself is, however, the same.

This Court held in *Alessi* that the New Jersey Act was preempted, "whatever [its] purpose or purposes" and even though it addressed "a matter quite different from pension plans," because it nonetheless "related to" the matter covered by the federal statute. *Id.* at 524. Rejection of the "purpose" test was necessary, said the Court, to prevent the states "from avoiding through form the substance of the preemption provision." *Id.* at 525. As the Court earlier had noted in *Perez v. Campbell*, 402 U.S. 637, 652 (1971), an implied preemption case, a "purpose" test would permit states to avoid preemption:

> . . . by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

See also International Paper Co. v. Ouellette, supra, 479 U.S. at 498-99, n.19 ("effect rather than purpose of a state statute governs preemption analysis").

When Congress wishes to preempt according to "purpose," it knows how to do so. *See Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983) (Atomic Energy Act; states may regulate for "purposes other than" those underlying the federal regulation). In the OSH Act, however, Congress chose not "purpose" language, but

rather the broad "relating to" language also used in ERISA (*supra*) and in other federal statutes.[11]

Significantly, OSHA itself has taken issue with the Third Circuit's approach. When certiorari was sought in *Manufacturers Ass'n of Tri-County v. Knepper*, No. 86-1102, this Court, sua sponte, solicited the views of the United States. In its amicus brief, the government agreed that the Third Circuit had "erred" and that its purpose analysis was "incorrect." *See* Brief for the United States as Amicus Curiae at 9, 13, 14. The proper inquiry, said the government, was whether a state law "related to" the matters addressed in the OSHA standard in either "primary purpose *or* effect." *Id.* at 13 (emphasis in original).

Even so, the Solicitor General recommended that the Court "postpone" consideration of the issue. *Id.* at 14. The government expressed its hope (*id.* at 10, 15, 18) that the Third Circuit would reconsider its position [12] and that the states would reconsider the wisdom of their right to know laws in light of the expansion of the OSHA standard to non-manufacturing industries in 1987 and the enactment of Title III of the Superfund Amendments and Reauthorization Act of 1986 (codified as the Emergency Planning and Community Right-To-Know Act, 42 U.S.C. § 11001 *et seq.*).[13] Unfortunately, that has not

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[11] *See, e.g.*, Railway Safety Act, 45 U.S.C. § 434 ("relating to railroad safety"); Clean Air Act, 42 U.S.C. § 7543(a) ("relating to the control of [motor vehicle] emissions").

[12] The Solicitor General perceived some tension between the *Knepper* and *Hughey I* decisions. *See* Amicus Brief at 15 n.13. With the decision in *Hughey II*, it is clear that the tension was illusory.

[13] It should be noted that this recent federal legislation has nothing whatever to do with container labeling, either in-plant or downstream. The Act does, however, require that firemen and emergency personnel be provided with comprehensive information about hazardous chemicals in forms other than labeling. *E.g., id.*

happened. Neither New Jersey nor the Third Circuit has receded from its position, and review by this Court is now appropriate.

The fundamental inadequacy of the "purpose" test is strikingly illustrated by the anomolous results that it has produced in the instant case. For example, as noted earlier, the requirement that substances on the state's "workplace" hazardous substance list be labeled was deemed preempted while the court simultaneously upheld the application of the state's "universal" labeling requirement to the very same substances. In other words, the court preempted the labeling requirement under subsection (a) of § 14 of the New Jersey Act and then reinstated it under subsection (b). The only difference is that the labeling is called one thing in subsection (a) and another in subsection (b).

The point is underscored by comparing the instant case with *Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130 (3d Cir. 1986), *cert. denied*, 108 S.Ct. 66 (1987), involving the Pennsylvania Worker and Community Right to Know Act, 35 Pa. Stat. Ann. § 7301 *et seq.* The workplace labeling provisions in the Pennsylvania and New Jersey Acts are essentially the same. The Pennsylvania statute also contains both a labeling requirement for "hazardous" substances and a "universal" labeling provision applicable to "the top five substances by volume" in a container. *See id.* § 7306(a)(1) & (4).[14] And yet, *Knepper* affirmed the district court's holding that *all* of the workplace labeling was preempted because communication to employees was the "chief" purpose of the labeling, 801 F.2d at 140, while *Hughey*

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at § 11021-22 (employers must provide "hazardous chemical inventory forms" and allow "on-site inspection[s]").

[14] Moreover, the "hazardous" substance labeling requirement includes, as does New Jersey's, substances on the State's "environmental" hazards list. *See id.* § 7303(d).

refused to preempt the virtually identical labeling provisions in the New Jersey Act.[15] A test that produces such diametrically opposed results is, we submit, both obviously and seriously flawed.

The issue here is whether a state's ostensible "purpose" should be the measure of federal preemption, not whether the court of appeals' reading of the purpose of the New Jersey labeling is correct. Nonetheless, the court's reading of the New Jersey law illustrates the imprecision and indeterminate nature of the "purpose" test. There is not a word in either § 14(a) or (b) about the public, firemen, emergency personnel, or the environment; only "employees" are mentioned, and they are mentioned repeatedly. *E.g.*, "will enable an *employee* to readily make a cross reference"; "will provide the *employee* with a chemical name and [CAS] number"; "allow the *employee* access to this information"; "shall be available to the *employee* at close proximity to his specific job location" (191-193a) (Emphasis added).[16] Labeling workplace containers is, moreover, by its very nature "primarily" for the benefit of employees who are the only ones routinely exposed to the containers and their labels.

Indeed, if the New Jersey labeling can survive, it is difficult to imagine a situation in which a state dissatisfied with the federal system would not be able to superimpose its own merely by representing that it is intended for the protection of firemen, other emergency personnel, and the public. Nor is there any reason why the same kind of purpose analysis could not be used by states to

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[15] To compound the confusion, the court in *Knepper* held that the state's "downstream" labeling requirements were *not* preempted even though the OSHA standard addressed the "downstream" issue as well. *See* 801 F.2d at 139, 140 n.8. As noted above, the New Jersey Act has no downstream component.

[16] The court in *Hughey II* expressly acknowledged "the force" of our arguments challenging *Hughey I*'s construction of the labeling section of the New Jersey Act. *See* 868 F.2d at 627 (16a).

impose other workplace requirements in circumvention of OSHA standards. The "firemen" and "emergency personnel" ploy used so effectively here could be applied with equal and perhaps greater justification to almost any workplace regulation. Note, for example, *Environmental Encapsulating Corp. v. New York*, 855 F.2d 48 (2d Cir. 1988), where the court employed a purpose test to sustain New York City's mandatory training program for asbestos workers in the face of a federal standard covering the identical matter.[17]

This is not to say that the "purpose" of a state law or regulation are necessarily irrelevant. "Purpose" may be a factor indicating that a state law "relates to" the matters covered by the federal standard. Thus, if the purpose is to any extent to inform workers, the law would seem to "relate to" the issues covered by the hazard communication standard. But mere attribution of a different or additional purpose should not save a state law if, in "effect," it nonetheless "relates to" matters covered by the standard, as the New Jersey labeling so clearly does.

II. The Third Circuit's Decisions Undermine the Role of OSHA in the Statutory Preemption Scheme

The Third Circuit has dismantled, without discussion, the carefully crafted scheme whereby Congress has designated OSHA[18] as the arbiter of which state laws should survive the expansive "relating to" preemption. The court has also swept aside, again without a word of explanation, OSHA's pronouncements that it intended

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[17] The court abandoned as unworkable the "primary" component of the test, thereby converting it into an "any" other purpose test. *Id.* at 57. The Third Circuit seems to have done the same in practice, as the panel in *Hughey II* appears to have recognized. *See* 868 F.2d at 627 (16a) (court noted that *Hughey I* panel ended its inquiry upon finding a purpose other than furnishing information to workers).

[18] The powers of the Secretary of Labor under the Act have been delegated to OSHA. *See* 29 C.F.R. §§ 1901.7, 1902.1(a) (1988).

the federal hazard communication standard to preempt state right to know laws, and more specifically, their in-plant labeling requirements. The result is " 'a serious evisceration of a congressionally crafted scheme . . .' " and the denial of the deference due to an agency's reasonable statutory interpretations. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 840, 844-45 (1986); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

Section 18 of the OSH Act, 29 U.S.C. § 667 (168a), creates a detailed administrative structure for states desiring to escape preemption and enforce a law that "relates to" an issue, such as in-plant container labeling, addressed by an OSHA standard. Subsection (b) requires a state to submit a "State plan" to OSHA, and subsection (c) provides guidelines for the agency to follow in determining whether to permit an otherwise preempted law to be enforced (169a). To survive, a state law must be "at least as effective" as the related OSHA standard, must "not unduly burden interstate commerce," and must be "required by compelling local conditions" (*id.*). And cognizant of the centrality of its role in the Congressional plan, OSHA expressed its intent "to scrutinize carefully any state law" submitted as part of a state plan "to assure . . . that any additional requirements contemplated by the state do not conflict with or adversely affect the effectiveness of [the] standard." 48 Fed. Reg. at 53322-323 (399-400a).[19]

The district court relied heavily upon this "State plan" construct, and New Jersey's avoidance of it, in conclud-

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[19] *Cf. City of New York v. Federal Communications Comm'n*, 108 S.Ct. 1637, 1645 n.5 (1988) ("state and local authorities remain free" to avoid express regulatory preemption by "petition[ing] the Commission for an individualized waiver that would permit them to 'impose additional or different requirements,' which they may seek to obtain by demonstrating that particular local conditions create special problems that make the federal technical standards inadequate").

ing that the New Jersey Act was expressly preempted. 600 F. Supp. at 618 (52a). The court of appeals, however, simply ignored the Congressionally mandated procedure, thereby effectively excising it from the statute. Rather than having OSHA pass upon the extent to which a state law may adversely affect a federal standard or unduly burden commerce, the courts will now do so using the wholly unsatisfactory and clumsy tools of court process and "implied" preemption analysis. The courts will assume OSHA's role as the guardians of the integrity of the federal program, a role that neither suits them nor was conferred upon them by Congress. OSHA will be relegated to the status of a bystander.

The Third Circuit decisions are also devoid of the deference due to OSHA's statements concerning the preemption of state right to know laws and in-plant labeling. The district court, on the other hand, relied upon OSHA's expressed intent "to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject . . . ." 600 F. Supp. at 617 (51a). As we pointed out in our discussion of the standard, OSHA was specifically concerned about the "proliferation" of conflicting state and local right to know laws and the regulatory burden which they imposed, and emphasized the need to preempt such laws in order to reduce this burden and insure nationwide uniformity. *See supra* at 5-6.

OSHA also made careful and pointed policy judgments in regard to the very "chemical identity" and "universal" labeling of in-plant containers required by the New Jersey Act. During the lengthy rulemaking, OSHA carefully considered and rejected proposals to require employers to use chemical names and CAS numbers on workplace labels and to label all substances rather than merely those that are hazardous.

Thus, when OSHA proposed a revised standard in 1982, it concluded that 'chemical identity' labeling should not be imposed because it could inhibit the effectiveness of hazard communication. *See* 47 Fed. Reg. at 12109-110. OSHA again rejected chemical identity labeling when it promulgated the final rule in 1983. *See* 48 Fed. Reg. at 53301-302 (306-311a), 53325-326 (415-416a). "Universal" labeling was rejected in 1981 when OSHA first proposed a standard, and again in 1983 when the final standard was issued. *See* 46 Fed. Reg. 4412, 4427; 48 Fed. Reg. at 53292 (271a). It is highly unlikely, to say the least, that OSHA would have engaged in such a painstaking process had it thought that states would nonetheless remain free to impose the rejected requirements. *Cf. International Paper Co. v. Ouellette, supra*, 479 U.S. at 497 ("It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure.").

CONCLUSION

The Third Circuit's decisions in this case are the leading ones in the field of OSHA preemption of state and local workplace regulation. Because of their prominence, they can only have a normative effect and greatly encourage the states to impinge even further upon OSHA's Congressionally conferred domain.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW JERSEY CHAMBER OF COMMERCE, et al.,
Petitioners,

v.

ROBERT E. HUGHEY, et al.,
Respondents.

FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, et al.,
Petitioners,

v.

WILLIAM VAN NOTE, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the container labeling provisions of the New Jersey Worker and Community Right To Know Act, which are intended to furnish chemical identity information to firefighters, police officers, other public safety officials and members of the community at large, are expressly preempted by the Occupational Safety and Health Act of 1970 and the container labeling provisions of OSHA's Hazard Communication Standard, which are solely designed to protect workers from chemical hazards?

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No. 1845
No. 1868

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

NEW JERSEY CHAMBER OF COMMERCE, et al.,
Petitioners,

v.

ROBERT E. HUGHEY, et al.,
Respondents.

FRAGRANCE MATERIALS ASSOCIATION
OF THE UNITED STATES, et al.,
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v.

WILLIAM VAN NOTE, et al.,
Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, defendants and defendants-intervenors in the Court of Appeals, respectfully request that this Court deny the petitions for writ of certiorari

seeking review of the opinion of the United States Court of Appeals for the Third Circuit. That opinion is reported at 868 F.2d 621 (3d Cir. 1989).

STATEMENT OF THE CASE

In 1983, the New Jersey Legislature enacted the Worker and Community Right To Know Act, N.J.S.A. 34:5A-1 to 31 (Right To Know Act). A central feature of this Act is the labeling requirements found in N.J.S.A. 34:5A-14. Section 14 requires the labeling of containers that contain hazardous substances (Section 14(a)) and the labeling of every other container covered by the Act (Section 14(b)). The latter provision is generally referred to as the "universal labeling provision" of the Right To Know Act.

The Occupational Safety and Health Administration (OSHA) has mandated in the Hazard Communication Standard (Standard), 29 C.F.R. sec. 1910.1200 (1988), that employers label containers of hazardous chemicals with

the identity of the hazardous chemicals and appropriate hazard warnings. 29 C.F.R. 1910.1200(f). These requirements have been established pursuant to OSHA's authority under the Occupational Health and Safety Act of 1970, 29 U.S.C. secs. 651-678, to promulgate standards governing employee health and safety.

In New Jersey State Chamber of Commerce v. Hughey, 774 F.2d 587 (3d Cir. 1985) (Hughey I), the court of appeals concluded that the part of the Right To Know Act requiring the labeling of workplace hazards in the manufacturing sector was expressly preempted by the OSH Act and the federal Standard. Id. at 595 (101a).[1] The Third Circuit also determined that, on the issue of implied preemption, there were material factual disputes regarding the confusion allegedly

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1. Throughout this brief,, citations to the Appendix, e.g. "101a", will be to the Appendix filed by the petitioners in No. 88-1845.

engendered by the existence of the New Jersey and OSHA labeling schemes. Id. at 596. (102a). Accordingly, the case was remanded to the district court. After four days of testimony, the district court found that the New Jersey Act was not an obstacle to the accomplishment of the federal standard and, consequently, held that the Act was not impliedly preempted by the OSH Act or OSHA's Standard. (121a, 147a).

The petitioners renewed their express preemption challenge to the Act's labeling provisions on appeal to the Third Circuit. In New Jersey State Chamber of Commerce v. Hughey, 868 F.2d 621, 627 (3d Cir. 1989) (Hughey II) (15a-16a), the court of appeals concluded that Hughey I had construed these labeling provisions as intended to furnish information about the identity of chemical substances to firefighters, police officers, other public safety officials and members of the community at large. Since the OSHA Standard only preempted state occupational

health and safety laws, and since the New Jersey Act, as construed in Hughey I, is designed to address legitimate state concerns other than worker protection, the court of appeals in Hughey II treated the express preemption of New Jersey's labeling requirements as foreclosed by the Hughey I determination. 868 F.2d at 627. (15a-16a).[2]

REASONS FOR DENYING THE WRIT

Petitioners seek review of the Third Circuit's determination that the New Jersey Right To Know Act's labeling requirements are not expressly preempted by the OSH Act or the

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2. The court of appeals also concluded "that the district court's finding that the Right To Know Act does not stand as an obstacle to the accomplishment of the purposes of the federal standard is not clearly erroneous, and that the district court correctly concluded that Section 14 of the Right To Know Act is not impliedly preempted." Id. at 631 (23a).

federal Hazard Communication Standard.[3] However, as we will explain, the well-reasoned decisions below do not conflict with any decision of this Court or of the other Circuits. Additionally, less than two years ago, this Court denied a petition for writ of certiorari presenting similar questions arising from the Third Circuit's consideration of the Pennsylvania Worker and Community Right to Know Act, Manufacturers Ass'n of Tri-County v. Knepper, 801 F.2d 130 (3d Cir. 1986), cert. den., ___ U.S. ___, 108 S.Ct. 66 (1987). Significantly, OSHA's promulgation of a revised Standard in August 1987 confirms the correctness of the court of appeals' approach to preemption. Consequently, for the reasons set forth below, the petitions for writ of certiorari should be denied.

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3. Petitioners have not sought review of the court of appeals' decision that the New Jersey Act's labeling provisions are not impliedly preempted by federal law.

I. The Court of Appeals' Decision Does Not Conflict With Any Decision Of This Court Or Of Any Other Circuit

Petitioners contend that there are two flaws in the court of appeals' analysis of express preemption: (1) the court construed the preemption provisions in the OSH Act and Hazard Communication Standard too restrictively; and (2) the court's focus on the purpose of the state labeling provisions permits a state to readily escape OSH Act preemption by merely asserting a non-occupational purpose. The petitioners' assertions reflect a misapprehension of the Third Circuit's decisions; more significantly, however, the lower court's opinion on these issues is consistent with the decisions of this Court and the only other Circuit that has considered a preemption claim in a similar context.

Prior to assessing petitioner's contentions, we will briefly describe the pertinent provisions defining the scope of OSHA preemption. The OSH Act and standards

adopted by OSHA under the Act are solely and exclusively concerned with occupational safety and health of employees in private-sector workplaces. See, e.g., 29 U.S.C. 654(a). Occupational safety and health standards adopted by OSHA apply "only to employers and their employment and places of employment," rather than to any "class of persons larger than employees." 29 C.F.R. 1910.5(d). Section 18(a) of the Act permits any state agency or court to "[assert] jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title." 29 U.S.C. 667(a). Under Section 18(b), when a state desires to develop or enforce "occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title," the state must secure OSHA approval of a state plan. 29 U.S.C. 667(b) (emphasis added). The Hazard

Communication Standard, as revised in 1987, further delineates the scope of federal preemption:

> This occupational safety and health standard is intended to address comprehensively the issues of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject . . . Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard, except pursuant to a Federally-approved state plan. [52 Fed. Reg. 31877 (592a)] [emphasis added].

With this background in mind, we will now consider petitioners' arguments. Petitioners first assert that the "relating to" language used in section 18(b) of the Act and repeated in the revised standard should be equated with the same term found in the very broad preemption clause of ERISA, which supersedes

"any and all State laws insofar as they may now or hereafter relate to any employee benefit plan . . ." 29 U.S.C. 1144(a). The two courts of appeal that have considered this contention have had no difficulty finding it to be without merit, given the wholly different purposes of ERISA and the OSH Act. In this regard, the lower courts' holdings are consistent with the view of this Court, which has described ERISA's preemption provision as "virtually unique." Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1, 24 n. 26 (1983).

In Hughey I, the Third Circuit concluded that to accord section 18(b) the same far-reaching scope as the ERISA preemption clause would be inconsistent with the OSH Act's important but limited purpose of protecting worker health and safety in the workplace. 774 F.2d at 593. (94a-95a). Reaching the same conclusion in a case involving another OSHA standard, the Second Circuit observed: "The only textual affinity that section 18

holds with ERISA's preemption provision is the use of the word 'related.'" Environmental Encapsulating Corp. v. City of New York, 855 F.2d 48, 56 (2d Cir. 1988). Thus, the consistent view of this Court and the courts of appeal, as the Second Circuit observed, is that the ERISA cases "must largely be confined to the ERISA regulatory scheme." Id.[4] Consequently, the court of appeals' conclusion that the OSH Act should not have a preemptive effect beyond the area of occupational health and safety is eminently correct (92a, 95a-96a); indeed, as we explain below (infra at p. 21-22), on a related appeal in the Third Circuit the Secretary of Labor took the identical position on the scope of preemption of the Hazard Communication Standard. (96a).

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4. It is also significant that the Solicitor General, in an amicus curiae brief filed at the request of this Court in Knepper, refused to adopt the view, urged by the present petitioners, that ERISA preemption cases are relevant in determining the scope of OSH Act preemption. Brief for United States As Amicus Curiae, No. 86-1102, at 14 n. 12.

Petitioners also contend that the court of appeals' inquiry into the purpose of the environmental hazards and universal labeling provisions conflicts with prior decisions of this Court. This claim is unsupportable. The lower court's consideration of whether the avowed concern of the state statute is outside the scope of federal regulation is consistent with, if not compelled by, this Court's opinion in Pacific Gas and Electric Co. v. State Energy Resources Commission, 461 U.S. 190 (1983). There, a California energy conservation and development statute established a moratorium on state certification of new nuclear power plants pending a state finding that the Nuclear Regulatory Commission had approved a method of permanent disposal of high-level nuclear waste. The Court construed the Atomic Energy Act to create a "dual regulation" of nuclear power generation: the federal government has exclusive and complete authority over safety aspects including construction and operation

of plants, while the states retain power to regulate economic aspects such as the need for additional facilities and rates. 461 U.S. at 211-212. The California provision imposing a moratorium on new construction would thus be preempted if enacted for "safety reasons," observed the Court, but not preempted if enacted for economic reasons. Id. at 213. It was therefore "necessary to determine whether there is a non-safety rationale" for the provision. Ibid. The state maintained that the statute was in fact "aimed at economic problems, not radiation hazards," and the court of appeals so found. Ibid.

In Pacific Gas and Electric Co., this Court reiterated the strong presumption against preemption of state laws enacted in the exercise of the police power. Id. at 206; see Hillsborough County v. Automated Medical Laboratories, supra, 471 U.S. 707, 715 (1985). It concluded that although the statute's purpose was "subject to varying interpretation," id. at 215, there was a

sufficient basis to "accept California's avowed economic purpose as the rationale" for the provision. Id. at 216. The Court noted that its general practice is to "place considerable confidence in the interpretations of state law reached by the federal courts of appeals." Id. at 214 (citations omitted).

Finally, the Court rejected the utility companies' arguments based on Perez v. Campbell, 402 U.S. 637 (1971), which is also heavily relied on by the present petitioners. Perez found preempted by the Bankruptcy Code an Arizona statute requiring the license suspension of uninsured motorists with unsatisfied judgments until they were able to demonstrate financial responsibility, even after the debts had been discharged in bankruptcy. Noting the state's claim that the statute's purpose was to deter irresponsible driving rather than to aid creditors, the Perez Court rejected the proposition that "state law may frustrate the operation of

federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration." 402 U.S. at 651-652. The Court in Pacific Gas found this reasoning in Perez inapposite to preemption analysis of the California nuclear energy provision, stating: "Only if there were an actual conflict between [the California provision] and the Atomic Energy Act, such that adherence to both were impossible or the operation of state law frustrated accomplishment of the federal objective, would Perez be apposite." 461 U.S. at 216 n. 28 (emphasis added).

The analysis and holding in Pacific Gas demonstrate the correctness of the preemption analysis of the New Jersey labeling provisions by the court of appeals. Initially, the underlying theme of the Third Circuit's opinion is the strong presumption articulated in Pacific Gas against the preemption of state laws designed to protect the public health, safety and welfare (96a-97a). As to the

universal labeling provision, section 14(b) of the Right To Know Act, the Third Circuit concluded in Hughey I and II that this provision is designed for a single purpose unrelated to any occupational or worker protection concern within OSHA's jurisdiction: to "furnish information to firefighters, police officers, and members of the community at large." (14a-16a).[5] This interpretation of state law by the court of appeals is entitled to "considerable" deference. Pacific Gas, 461 U.S. at 214.[6] Moreover, applying the clearly erroneous test to the factual findings of the district court on the implied preemption issue, (20a) (citing Hillsborough

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5. The district court, after hearing testimony on the purposes of the New Jersey Act, found that "[u]niversal labeling has primary purposes other than worker protection." (148a).

6. Petitioners' efforts in the case at bar to upset this interpretation by the lower court are no more persuasive than the similar arguments rejected by this Court in Pacific Gas. 461 U.S. at 214-216.

County, supra, 471 U.S. at 720-721), the court of appeals agreed that universal and environmental hazards labeling "does not stand as an obstacle to the accomplishment of the purposes of the federal standard," (23a) and petitioners have not contested that determination in this Court. Thus, in the absence of any conflict between state and federal law, or any frustration of the objectives of the Standard, the passage in Perez v. Campbell relied upon by petitioners is wholly inapposite to the present case.

Consequently, consistent with this Court's preemption decisions, the court of appeals correctly determined that New Jersey's avowed purpose in the Right To Know Act's labeling provisions of furnishing chemical identity information to firefighters, police officers and the members of the community at large places these provisions of the Act outside the preempted area of worker health and safety.

2. The Court of Appeals' Preemption Analysis Is Consistent With The OSHA Standard

The court of appeals below, both in its two Hughey opinions and in its intervening opinion in Manufacturers Association of Tri-County v. Knepper, 801 F.2d 130 (3rd Cir. 1986), cert. denied, ___ U.S. ___, 108 S.Ct. 66 (1987), analyzed state labeling provisions to determine whether they were directed to the promotion of occupational health and safety, and were thereby expressly preempted, or whether they had a non-worker health and safety purpose and, as a result, were outside the preemptive scope of OSHA's Standard.

Petitioners argue that this approach to preemption effectively negates the scheme in section 18 under which states wishing to regulate with respect to issues addressed by an OSHA standard must secure OSHA approval of a state plan. In fact, however, when OSHA revised the Hazard Communication Standard in 1987, the agency specifically adopted the test formulated in Hughey I and Knepper. In the

preamble to the revised standard, OSHA refers to these and other recent preemption decisions of the courts of appeals and then concludes:

> The revised sec. 1910.1200(a)(2) not only defines hazard communication as an "issue" under the terms of the Act, but also enumerates the generic areas addressed by the standard for purposes of establishing the parameters of preemption. Thus any State or local government provision requiring the preparation of material safety data sheets, labeling of chemicals and identification of their hazards, development of written hazard communication programs including lists of hazardous chemicals present in the workplace, and development and implementation of worker chemical hazard training for the primary purpose of assuring worker safety and health, would be preempted by the HCS unless it was established under the authority of an OSHA-approved State plan. [52 Fed. Reg. 31861 (537a-538a); emphasis added.]

Conversely, a state provision concerning "labeling of chemicals" whose "primary purpose" is not that of "assuring worker health and safety" is not preempted, under OSHA's most recent pronouncement. Such interpretive comments by a federal agency

accompanying its adoption of regulations should be given substantial weight in discerning the agency's intent. Cf. Hillsborough County v. Automated Medical Laboratories, 471 U.S. 707, 714 (1985).

This interpretation by OSHA of its revised Standard displaces an earlier depiction of its position in an amicus curiae brief submitted by the Solicitor General in Knepper. That brief, cited by both petitioners here (Petition of New Jersey Chamber of Commerce at 20-22; Petition of Fragrance Materials Association at 18), discusses the preemptive scope of the original Standard. According to OSHA, under that Standard state right to know provisions were preempted "which have, as their primary purpose or effect, the regulation of communication of hazard information to manufacturing employees." Brief for United States As Amicus Curiae, No. 86-1102 at 9 (emphasis added); see also id. at 13. As noted above, the "effect" component of the

preemption calculus has been deleted, and in the revised standard OSHA has adopted the "primary purpose" test applied by the Third Circuit. Petitioners' reliance on the Solicitor General's discussion of language in the original Standard is thus misplaced in light of OSHA's unequivocal statements in the revised Standard.[7]

Indeed, OSHA's position in the revised Hazard Communication Standard on preemption of state right to know provisions that address public, rather than occupational, health and safety concerns, was adumbrated in a brief filed by the Secretary of Labor in United Steelworkers of America v. Auchter, 763 F.2d 728, 735 (3d Cir. 1985). That brief states:

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7. As explained above, even when the effect of the New Jersey labeling provisions on the OSHA scheme is considered, the factual findings of the lower courts, which are not challenged by petitioners, establish that (1) there is no conflict between the state and federal law, and (2) New Jersey's additional labeling requirements do not frustrate the accomplishment of the federal objectives.

> The Secretary's mandate under the OSH Act extends only "to assur[ing] so far as possible every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C. 561(b). Public health and safety, including general environmental problems originating in the workplace, but whose effects are outside it, are beyond his purview. The preemptive effect of an OSHA standard can be no broader than the Secretary's mandate. There is accordingly no controversy between the Secretary and those states that argue "[i]nsofar as activities involve the health or safety of the general public, there is not Federal regulatory [including preemptive] authority under OSHA . . ." [Brief for Secretary of Labor at 88-89; brackets in original and emphasis added.]

Petitioners conveniently overlook the Third Circuit's reliance, in determining the scope of federal preemption, on the agency's interpretation of the OSHA Standard. 774 F.2d at 593 (96a).

Finally, the assertion by petitioners that the court of appeals' decisions allow New Jersey to "second guess" the federal agency's labeling determinations, and thereby undermine OSHA, is without merit. There is simply no

indication that OSHA intended to preclude the chemical identity labeling required by New Jersey's Right To Know Act. Rather, OSHA's repeated statements make it clear that the Hazard Communication Standard adopts a performance-oriented approach that allows employers to take advantage of a wide variety of compliance approaches, and to utilize diverse labeling systems, so long as the standard's minimal information requirements are fulfilled. See, e.g., 47 Fed. Reg. 12111 (Notice of Proposed Rulemaking) (212a); 48 Fed. Reg. 53301 (306a-308a). Indeed, OSHA explicitly rejected the idea of a standardized or specific labeling format as suggested by several commentators, (307a-308a), and the agency's failure to require the chemical name on a label is clearly not the same as an affirmative decision to prohibit this information. In light of these statements of agency intent throughout the recent history of the Standard, it is entirely disingenuous to simply assert, as do petitioners, that OSHA's

labeling requirements somehow imply a determination that the information required by Section 14 in the New Jersey Right To Know Act is prohibited.

Furthermore, nothing in the 1987 revised Hazard Communication Standard expresses or implies an intent to restrict label content to the OSHA-required indentifier and hazard warning. Rather, OSHA expressly recognizes in the preamble to the revised Standard that "employers can choose to provide additional statements" on labels and utilize any format "as long as the label includes the information regarding the chemical hazards required by the standard." 52 Fed. Reg. 31864. (551a). Therefore, the court of appeals properly concluded that petitioners' assumption that the OSHA Standard dictated a "fixed rather than flexible" scheme was "unfounded" (21a-22a).

In sum, the court of appeals' express preemption analysis has been guided by, and is entirely consistent with, the position

articulated by the Secretary of Labor and adopted by OSHA. Petitioners' assertion that the court of appeals' decision would impair or impede OSHA's ability to regulate employee health and safety concerns fails to withstand scrutiny.

CONCLUSION

For the foregoing reasons, the petitions for writ of certiorari in No. 88-1845 and No. 1868 should be denied.

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IN THE
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FRAGRANCE MATERIALS ASSOCIATION OF THE UNITED STATES, *et al.*,
Petitioners,
v.
WILLIAM VAN NOTE, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF IN SUPPORT OF PETITION

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ARGUMENT

1. The significance of the opposing brief lies in its total failure to justify converting the expansive "relating to" language employed by Congress in § 18(b) of the OSH Act, 29 U.S.C. § 667(b) (169a), into a "purpose" test and simultaneously eliminating OSHA's primary role in the statutory preemption scheme. Respondents do not even make a pass at such a showing. Nor do they make any effort to refute our demonstration that the "purpose" test would facilitate wholesale circumvention of the preemptive effect of the hazard communication standard and, for that matter, virtually any workplace standard promulgated by OSHA. Indeed, respondents specifically confirm the semantic nature of the test, and the ease with which it can be manipulated, by urging (at 8) that a state or municipality may escape federal preemption sim-

ply by characterizing its regulation of workplace conditions as something other than "occupational."

Faced with this Court's strong admonition in ERISA cases that allowing preemption to turn upon a state's "purpose" would open the door wide to circumvention (*see* Petition at 17), respondents assert (at 10) that this Court described the ERISA statutory provision as "virtually unique" in *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, n. 26 (1983). But as the Court's discussion plainly shows, the Court was referring to ERISA having authorized the federal courts to fashion a body of federal common law to govern rights and duties under private pension plans, not to the "relating to" language that Congress consciously chose as the test of preemption in both ERISA and the OSH Act.[1] The Court's observation would not, in any event, detract from the common sense and precedential force of the Court's devastating critique of the "purpose" test, or from the necessity of granting certiorari to resolve the issue under the OSH Act.

The weakness of respondents' position is only highlighted by their heavy reliance upon *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983). As we noted in our Petition (at 17), the statute at issue in *Pacific Gas* specifically directed a "purpose" test. *See* 461 U.S. at 210. In other words, when Congress wishes to preempt according to purpose, it knows how to do so. But whatever test Congress adopts, the courts must apply it.[2]

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[1] It is, we submit, simply bewildering that the court in *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48, 56 (2d Cir. 1988), could have missed the clear implications of its own observation that "[t]he only textual affinity that section 18 holds with ERISA's preemption provision is the use of the word 'related' . . . ."

[2] The Court, in *Pacific Gas*, recognized the "unsatisfactory" nature of a purpose test and the ease with which it could be manipulated to avoid preemption. *See* 461 U.S. at 216.

2. In the amicus brief filed in *Manufacturers Ass'n of Tri-County v. Knepper*, No. 86-1102, the Solicitor General urged that the proper inquiry is whether a state law relates in either "purpose *or* effect" to the matters addressed in the federal standard. *See* Petition at 18-19.[3] Respondents, however, assert that the government has vacillated and that the deliberate, focused statement of position submitted to this Court by the Solicitor General was somehow "displaced" by a single reference in the preamble to the 1987 amendments to the hazard standard. *See* Opposition at 20-21. Respondents, of course, have their chronology backwards. The Solicitor General's amicus brief came *after*, not before, the 1987 amendments and even cited to the latter. *See, e.g.*, Amicus Brief at 15.[4]

Should the Court feel the need, it could, of course, again solicit the government's views as was done in *Knepper*. We note, in this connection, that the purely prudential reasons suggested by the Solicitor General in *Knepper* for "postponing" review of the Third Circuit's "purpose" test no longer obtain. *See* Petition at 18-19.

CONCLUSION

Respondents' opposition confirms the serious impact of this case upon the OSH Act's preemption scheme and the need for this Court to review the dangerously distorted state of preemption law resulting from the Third Circuit's decisions. Absent such review, the "purpose" test

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[3] In their footnote 7 (at 21) and elsewhere, respondents garble the distinction between a relation "in effect" to the federal standard, such as we have here, and the adverse "effects" that must be demonstrated for "implied" preemption.

[4] Moreover, even the court of appeals recognized in *Hughey II* that the 1987 amendments were "minimal" and did not affect the statutory "relating to" preemption test. *See New Jersey Chamber of Commerce v. Hughey*, 868 F.2d 621, 623, 625 (3d Cir. 1989) (6a, 11-12a).

will continue to dominate the field and the statutory preemption provision will be a dead letter.

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